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No. _____

In The

Supreme Court of the United States

JOHN E. JUDGE

Petitioner

vs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN E. JUDGE
2915 West Charleston Blvd. Ste. # 7
Las Vegas,
Nevada, 89102

73PP

QUESTIONS PRESENTED

Did the Court of Appeals err in affirming the ruling of the United States District Court that the action was barred by the Eleventh Amendment to the U.S. Constitution ?

Did the Court of Appeals err in affirming the ruling of the United States District Court that a Motion To Dismiss is a proper pleading in answer to a complaint ?

Did the United States District Court err in failing to find a distinction between a State Agency and the State in view of several California Judicial decisions on the issue ?

Did the Court of Appeals err in tacitly affirming this error ?

LIST OF PARTIES

All parties are named in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ Of Certiorari to review this case decided by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is an unpublished opinion cited as No 98 - 55821 (June 5, 2000) and reprinted in the appendix at App. 1.

The opinion of the United States District Court is case No. CV 99 - 0069 CBM (CWx), also an unpublished opinion filed on April 6, 1999, and entered on April 7, 1999, and is reprinted in the Appendix at App. 2.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked under the provisions of U.S.C. # 1254 (1)

PROVISIONS INVOLVED

Constitutional provisions

Eleventh Amendment to theUnited States Constitution

Statutory provisions

Federal Rules of Civil Procedure - Rule 7 and Rule 7 (a).

Judicial Decisions

Federal : Opinion of the United States Court of Appeals for the Eleventh Circuit.

: Decision of the United States District Court for the Central District of California.

State : Opinion of the Supreme Court of California.

Opinion of a California Court of Appeal.

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the Central District of California, which was assigned Number CV-99-00069 (CBM) against the Superior Court of the State of California, alleging that

1. Section 391 (a) of the California Code of Civil Procedure, is violative of Article V1 of the United States Constitution in that it seeks to exercise jurisdiction over litigation in " any State or Federal Court of Record ".

2. The California Superior Court erred in declaring Petitioner to be a vexatious litigant under other provisions of the statute.

Defendant, in response thereto filed a Motion To Dismiss on the grounds of (a) Lack of Jurisdiction, and (b) the action was barred by the Eleventh Amendment to the United States Constitution. Defendant admitted in its Motion To Dismiss that the Superior Court is an agency of the State (page 3, lines 13, 22 and 27), citing, inter alia, California Constitution, Article 6, #15. Petitioner opposed this Motion on the grounds that the Eleventh Amendment barred actions only against the State and not against any of its agencies.

STATEMENT OF THE CASE - contd.

Petitioner also opposed the Motion on the ground that it is in violation of Rule 7 and 7(a) of the Federal Rules of Civil Procedure as that rule was interpreted by the United States Court of Appeals in a scholarly analysis in Burns v Lawther, (infra).

The United States District Court granted the Motion To Dismiss, and specifically ruled that " It is appropriate for Defendant to respond to Plaintiff's complaint with a Motion To Dismiss in lieu of an answer or other"responsive pleading" without citing any authority for that ruling.

The Court of Appeals for the Ninth Circuit affirmed that decision on May 30, 2000.

The jurisdiction of the United States District Court is based on Diversity of Citizenship.

REASONS FOR GRANTING THE WRIT

The action is not barred by the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution provides as follows :

" The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State". (emphasis added)

In *Burns v Lawther*, 53 F. 3rd. 1237, (11th. Cir. 1995) the Court stated the law to be :

"Under the well-settled doctrine of *inclusio unius, exclusio alterius,* the listing of some things implies that all things not included in the list were purposefully excluded "...citations (emphasis provided by the Court)

Based on this decision only "one of the United States " may enjoy the immunity. Since agencies of a State are not listed an agency of any State is not immune to an action under the statement of the law announced by the Eleventh Circuit, *supra.*

In *DelMar v Caspe,* (1990) 221 C.A. 3rd. 1316, 272 Cal. Rptr. 446, the California Court of Appeal, addressing the same issue ruled that :

" When exceptions to a general rule are specified other exceptions are not to be implied or presumed ".

The Constitutional provision in the Eleventh Amendment, by specifying that only actions "against one of the United States" enjoy the immunity, excepted all other entities from its protection.

The Supreme Court of California, en banc, in *Regents of the University of California v Superior Court of Alameda County* (1976) 131 Cal. Rptr. 228, 230, 551 P. 2d. 846, (rehearing denied August 7, 1976) ruled, in a case involving usury, "There is no express exemption from the Usury laws for the State, its Subdivisions or agencies " (emphasis added).

Defendant, in its Motion To Dismiss, admitted , on page 3, lines 13, 22 and 27 that the Superior Court is an agency of the State of California.

Therefore, by virtue of the Eleventh Amendment limiting, by its terms, immunity "to one of the United States ", and the California Supreme Court clearly ruling that the state is a separate and distinct entity from its Subdivisions and its

Agencies, (Regents v Superior Court, *supra*) Defendant, by its own admission, being an agency of the State, is not under the cloak of immunity provided by the Eleventh Amendment and, therefore, is not shielded against actions by a citizen of another State as occurred herein.

The Courts' Decisions are in violation of the Federal Rules of Civil Procedure.

A Motion To Dismiss is not a " pleading " in response to a complaint under the provisions of Rule 7 of the Federal Rules of Civil Procedure. This precise issue was addressed by the Court of Appeals for the Eleventh Circuit in *Burns v Lawther*, supra, wherein, in a scholarly analysis and a dissertation of what constitutes a " pleading " the Court ruled as follows, on pages 1240 and 1241 :

> "The Federal Rules of Civil Procedure, like any statutory scheme, should be given their plain meaning. (citations). Fortunately the Rules them-

selves provide a clear and precise meaning of "pleadings" in Rule 7.

Rule 7 (a) states : Pleadings. There shall be a complaint and an answer ; a reply to a counter claim denominated as such ; an answer to a cross-claim ; a third-party complaint....and a third-party answer.....*No other pleading shall be allowed,* except that the Court may order a reply to an answer or a third-party answer. Fed. R.Civ. P.7(a) (all emphasis provided by the Court)

Rule 7 clearly states that a pleading is (1) a complaint, (2) an answer, (3) a reply to a counter-claim, (4) answer to a cross-claim, (5) a third-party complaint, or (6) a third-party answer. Under the well-settled doctrine of *inclusio unius, exclusio alterius,* the lsting of some things implies that all things not included in the list were purposefully excluded (citations). Rule 7 explicitly excludes everything else from the definition of pleadings..... Finally, we note that this Court, in determining what constitutes a pleading under Rule 15, has stated that "neither a motion to dismiss nor a motion for summary judgment constitutes responsive pleadings for purposes of the federal rules" (citations).

The Court in *Peoples' Counsel v Public Service Commission*

451 A. 2d. 945, 982, ruled that

"When a Rule adopted by the Court Of Appeals says that

something shall be done the Court jolly-well means for it to be done ; the direction is a mandatory one, and it must be obeyed ". (emphasis supplied by the Court)

In *Williams v State* (Fla. App.) 318 So. 902, 903, the Court, addressing the same issue ruled as follows :

"The word shall as used by the Supreme Court, when establishing Rules Of Court Procedure means exactly what it usually means as defined in an acceptable dictionary, and thus it is error for a trial court to fail to apply it ".

Black's Law Dictionary, 6th. Ed. (1990), page 1375, Col. 1, an " acceptable dictionary " defines the word "shall" as follows

".....the term shall is a word of command, and one which has always been, or which must be, given a compulsory meaning as denoting obligation. The word in ordinary meaning means " must " , and is inconsistent with a concept of discretion. It has the invariable significance of excluding the idea of discretion and has the significance of operating to impose a duty which may be enforced ".

From the above it is clear that Defendant's Motion To Dismiss is not a " pleading " in response to Petitioner's complaint and must be disregarded. It is also clear that the District Court was in error and in violation of Rule 7 of the Federal Rules of Civil Procedure in its ruling wherein it stated " It is appropriate for

Defendant to respond to Plaintiff's complaint with a Motion to Dismiss in lieu of an answer or other "responsive pleading". It is also clear that the United States Court of Appeals for the Ninth Circuit erred in affirming the decision of the District Court in which its opinion is in conflict with the well-reasoned opinion of the Eleventh Circuit Court of Appeals rendered in Burns v Lawther, *supra.*

Since no other pleading has been filed by Defendant, which is represented by counsel who are charged with knowledge of the law as discussed herein, in response to Petitioner's complaint, and since the time for filing an answer under Rule 15(a) or Rule 27 if it is applicable, has expired, the allegations of the complaint are uncontroverted, and Petitioner is entitled to a judgment in accordance with his prayer.

The District Court further erred in faiing to follow the law as stated by the following Courts, all of which were presented to it by Petitioner in his Opposition To Defendant's Motion To Dismiss on pages 13-15, as were all the authorities cited supra.

In *NL Industries v Kaplan*, 792 F. 2d. 896, 898, (9th. Cir. 1986) the Court ruled that

"In considering a Motion To Dismiss, the Court must accept all material allegations of the complaint in question as true". (emphasis added).

In *Jenkins v McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d. 404 the United States Supreme Court ruled as follows :

"Moreover, in evaluating the complaint, the Court is to construe the pleading in the light most favorable to the pleader and all doubts are to be resolved in the pleader's favor..... The complaint should not be dismissed unless it appears that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief "(citation)(emphasis added)

In *Bartholit v Reishauer*, A.G. 953 F. 2d. 1073, 1078 (7th. Cir. 1992) the Court held

"A complaint should not be dismissed with prejudice unless it appears beyond doubt that the Plaintiff is unable to prove any set of facts consistent with the complaint which would entitle him to relief". (emphasis added).

In his complaint filed with the District Court Petitioner has clearly shown by the documentary evidence attached thereto and the Points and Authorities filed with his Opposition to

the Motion To Dismiss that he was entitled to the relief for which the complaint prayed because he can prove " any set of facts in support of his claim ". (Fed. Rules Civ. Proc. 12 (b)(6) and 28 U.S.C.A.)

In *U.S.v Beethoven Associates Ltd. Partnership*,843 F. Supp. 1257, the Court ruled, on page 1259, 1260 [8]

"Because the present Motion sounds under 12 (b)(1) lack of subject matter jurisdiction, we may consider matters outside the pleading. See e.g.*Charles A. Wright and Arthur A. Miller Federal Practice and Procedure*, # 1350, at 213, (2nd. Ed. 1990). Thus we may look beyond the jurisdictional allegations in the complaint and view whatever evidence has been submitted in response to the motion ".

The Court in *Mellon Bank N. A. v Ternisky*, 999 F. 2d. 791, (4th. Cir. 1993) addressing the same issue, ruled at 795

"We agree with the district court, however, that Mellon never filed a pleading in *Bhatla*. In response to the complaint , Mellon filed a Rule 12 (b)(6) motion to dismiss, which is not a pleading. *See* Fed. R. Civ. P. 7, 12. Rule 13 (a) does not come into play when a defendant files only a motion to dismiss instead of a pleading ". (emphasis added).

Based upon all the above it is clear that the District Court erred when it granted Defendant's Motion To Dismiss the complaint and dismissed it with prejudice.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

_____

John E. Judge

Dated November 8, 2000

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99 - 55821
CT/AG# : CV-99-00069 - CBM

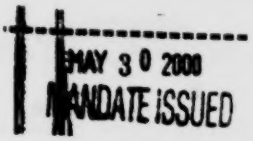
JOHN E. JUDGE

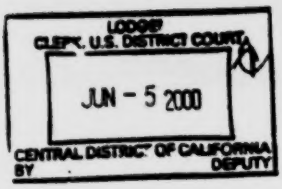
Plaintiff - Appellant

v

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Defendant - Appellee





APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

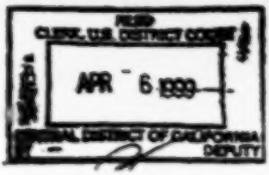
THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 5, 2000

APPENDIX 2

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIDORNIA

JOHN E. JUDGE,

CASE NO. CV 99-0069 CBM (CWx)

Plaintiff

ORDER GRANTING DEFENDANT's
MOTION TO DISMISS

SUPERIOR COURT OF
CALIFORNIA,

Defendant.

The matter before the court is Defendant's Motion To Dismiss. On April 5, 1999, the parties appeared before the court, the Honorable Consuela B. Marshall, United States District Judge. Upon consideration of the papers and arguments submitted , the court GRANTS Defendant's Motion.

DISCUSSION

The Ninth Circuit has held claims against the California Superior Court, " in law and equity " are barred by the Eleventh Amendment. See Greater Los Angeles Council on Deafness Inc. v Zolin, 812 F. 2d. 1103, 1110, n 10 (9th. Cir. 1987). Plaintiff apparently concedes this point, but contends that Defendant waived its right to raise the Eleventh Amendment objection by "accepting" the Complaint and the First Amended Complaint, and by filing " its Motion To Dismiss in response thereto ".

A waiver of Eleventh Amendment immunity is not to be lightly inferred. Mills Music Inc. v State of Arizona, 591 F. 2nd. 1278, 1282 (9th. Cir. 1979). The waiver mus be "stated by the most express language or by such overwhelming implication from [a written] text as [will] leave no room for any other reasonable construction ". Actmedia Inc. v Stroh 830 F. 2d. 957, 963, n. 4 (9th. Cir. 1986) (citation omitted). Defendant raised the Eleventh Amendment defense in its first set of responsive papers. It is appropriate for Defendant to

respond to Plaintiff's complaint with a Motion To Dismiss in lieu of an answer or other " responsive pleading ". The mere act of filing a Motion To Dismiss did not effect a waiver, and Plaintiff is therefore barred from pursuing this action against the Superior Court of California.

Accordingly, Plaintiff's complaint is dismissed with prejudice.

IT IS SO ORDERED

DATE 4 /6/ 99

CONSUELO B. MARSHALL

UNITED STATES DISTRICT JUDGE.